OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 96-67 October 23, 1996

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: B. Allan Benson, Acting Associate General Counsel

SUBJECT: Alternative Argument in the Withdrawal of Recognition Cases

In *Lee Lumber and Building Material Corp.*, 322 NLRB No. 14, the General Counsel in his brief to the Board as an alternative argument suggested that the Board should consider overruling decisions such as *Celanese Corp.*, 95 NLRB 664, which hold that an employer may lawfully withdraw recognition on the basis of a good-faith doubt of a union's majority status. In lieu thereof, the General Counsel suggested that the Board should adopt a rule of law that no employer may lawfully withdraw recognition from a certified bargaining representative unless, at a time when the employer is still honoring its bargaining obligation, a majority of the employees reject union representation in a secret-ballot election conducted at an appropriate time and on the basis of a 30 percent showing of interest. A copy of the General Counsel's brief in *Lee Lumber* will be made available to each Region via electronic mail. In *Lee Lumber*, supra, at footnote 14 of its decision, the Board declined to address the above argument because the parties and amici were not provided sufficient notice that the issue would be a subject for consideration by the Board.

In view of the foregoing, and in order to present this legal theory to the Board, the General Counsel will continue to rely on the above *Lee Lumber* theory as an alternative argument to support otherwise meritorious withdrawal of recognition allegations involving a certified union. Accordingly, Regions should make this alternative argument in all cases where they would be issuing an 8(a)(5) and (1) withdrawal of recognition complaint under existing Board law involving a certified union.

In such cases, we should, as part of the General Counsel's opening statement, indicate that we will be arguing the *Lee Lumber* theory as one of our arguments. In new complaint cases, it is not necessary to include any new allegations other than the language contained in the pleadings manual under

Section 605.2(e), Withdrawal of Recognition. However, Regions may have found it advisable, given the particular circumstances, to further plead that the respondent lacked a good-faith doubt or that there was no actual loss of majority. In these circumstances, the Region should also initially plead or amend an outstanding complaint to include an allegation that the respondent has withdrawn recognition from the certified union at a time when a majority of the unit employees have not rejected the union in a secret-ballot election.

Notwithstanding the above, complaints should not issue where the only basis to support the withdrawal of recognition allegation is the *Lee Lumber* theory. Rather, the Regions should dismiss, and not hold in abeyance, any case where the Region would dismiss the withdrawal of recognition allegation of the charge under existing case law.

If you have any questions regarding this memorandum, please contact the Division of Advice.

B. A. B.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LEE LUMBER AND BUILDING MATERIAL CORP.

Employer

and Case 13-CA-29377

CARPENTER LOCAL NO 1027,
MILL-CABINET INDUSTRIAL DIV.,
a/w UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF
AMERICA, AFL-CIO

Charging Party

GENERAL COUNSEL'S POSITION STATEMENT ON RECONSIDERATION BY THE BOARD

On February 7, 1995, and February 16, 1995, the National Labor Relations Board advised the parties it wished to hear oral argument in this case on March 13, 1995, and that pre-argument briefs were due March 6, 1995. In response, the General Counsel submits the following position statement:

STATEMENT OF THE ISSUES

1. Whether the Company was barred from withdrawing recognition from the Union because it did not repudiate its prior unfair labor practices in a timely and effective manner.

2. Whether the Company was barred from withdrawing recognition from the Union because that withdrawal occurred prior to the employees' expressing their desires in a secret ballot election.

3. Whether an affirmative bargaining order is the appropriate remedy for the Company's protracted unlawful refusal to recognize the Union.

I. STATEMENT OF FACTS

The pertinent facts, as set forth in the Board's initial decision,[1] are as follows. In order to facilitate comparison with the briefs previously submitted, references are to the slip opinion.

In 1988, following a Board-conducted election, Carpenter Local 1027, Mill-Cabinet Industrial Division, a/w the United Brotherhood of Carpenters and Joiners of American, Chicago and Northeast Illinois District Council of Carpenters, AFL-CIO ("the Union") was certified as the representative of the mill shop employees at the Company's Chicago facility. The parties signed a collective-bargaining agreement that was effective from May 26, 1989, through May 25, 1990. (ALJD 3.)

On February 1, 1990, the Union requested bargaining for a new agreement. Not having received a definite date for the start of negotiations, the Union eventually sent a letter stating that, if it did not hear otherwise, it would come to the Company's offices on April 11 to begin bargaining. However, on March 20, employees filed a petition to decertify the Union with the Board. Although the Company did not participate in the preparation or

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[1] Lee Lumber & Building Material, 306 NLRB 408 (1992).

circulation of the decertification petition or otherwise unlawfully encourage the decertification activities (D&O 3, ALJD 9), the Company did assist the three employees involved in the delivery and processing of the petition at the Board regional office by providing them with paid time off to file the petition and by reimbursing them $7.00 for parking at the Board's office.

Based on the March 20 decertification petition, the Company refused to bargain with the Union on and after April 11. The Company admitted that it did not know how many employees had signed the petition. (D&O 3, ALJD 3-4, 15-21.) The Company later changed its mind and agreed to bargain with the Union. The parties commenced negotiations on May 23 and were nearly in complete agreement when, on July 2, 1990, employees presented the Company with a second petition, signed by a majority of employees in the unit, stating they "will not continue to be represented by any union" and that they were "hereby decertify[ing] Carpenters Union Local 1027." On the basis of that July petition, the Company withdrew recognition from the Union the following day. (ALJD 28, 30.)

The Board found, in agreement with the administrative law judge, that the Company unlawfully provided assistance to the employees who filed the decertification petition by granting them paid leave and reimbursing their parking (D&O 3). The Board also agreed with the judge that the Company violated the Act by delaying negotiations for six weeks on

the basis of the decertification petition (D&O 3, ALJD 21). As the judge noted, the Company "had no idea" whether a majority of the employees in the unit signed the petition, and, in any event, their signatures "merely expressed a desire for an election . . . ." (ALJD 20-21), citing Dresser Industries, Inc., 264 NLRB 1088 (1982), and RCA Del Caribe, Inc., 262 NLRB 963 (1982).

In further agreement with the judge, the Board concluded that the Company's unlawful assistance to the decertification movement and its six-week delay in bargaining tainted the second petition and therefore made unlawful the Company's withdrawal of recognition (D&O 3 n. 15). In finding taint, the judge evaluated the evidence under the standards set forth in Guerdon Industries, 218 NLRB 658, 661 (1975), and NLRB v. Nu-Southern Dyeing, 444 F.2d 11, 15-16 (4th Cir. 1971). That is, the judge recognized that taint is shown only if the unfair labor practices are "of such a character as to either affect the Union's status, cause employee disaffection or improperly affect the bargaining relationship itself," and that to avoid a bargaining order, an employer must show that the violations "did not significantly contribute" to a loss of majority status (ALJD 31-32).[2]

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[2] The Board also agreed with the judge that the Company had unlawfully failed to respond fully to the Union's request for health insurance cost data (ALJD 22-25). However, the Board and the judge agreed that this violation did not taint the petition because the Company's noncompliance

With respect to the unlawful assistance, the judge noted that the Company had sent a "message of approbation" by granting employees paid leave to file the petition. The judge also concluded, based in part on additional violations later dismissed by the Board,[3] that the assistance was a "signal tending to convince those involved in this, and any future effort to repudiate the Union, that the [Company] openly endorsed their venture." (ALJD 16-17.) Concerning the delay in bargaining, the judge noted that it had caused "an irreparable loss of time" and was a "serious breach in the negotiations" (ALJD 20-21). He concluded that the "unremedied illegalities" would "offer the most likely cause of the Union's loss of majority" and that "it [was] entirely possible that [the six-week delay] not only contributed to renewed frustration with collective bargaining, but prevented the Union from neutralizing doubts and restoring confidence among represented employees by offering the tangible assurances evident from a new contract" (ALJD31).

To remedy the Company's unlawful withdrawal of recognition, the Board entered a cease and desist order and,

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was "marginal" and employees were unaware of or unconcerned about the dispute (D&O 3 n.15, ALJD 32 n.45).

[3] The Board did not adopt the judge's finding that the Company violated the Act by making certain remarks about profit-sharing and giving employees general instructions about the filing of a decertification petition shortly before the close of the window period for filing (D&O 2-3).

affirmatively, required the Company to recognize and bargain with the Union and to post a notice to employees (D&O 3-4).

ARGUMENT

The threshold question on reconsideration is whether the Board correctly found that the Company unlawfully withdrew recognition from the Union on the basis of the July 1990 decertification petition signed by a majority of the bargaining unit. If the Board reaffirms its original unfair labor practice finding, the Board must then decide whether an affirmative bargaining order precluding a decertification election for a reasonable period is an appropriate remedy.

We submit there are two separate grounds on which the Board should reaffirm its prior unfair labor practice findings. We further contend that an affirmative bargaining order is the appropriate remedy if the Board reaffirms its prior unfair labor practice findings.

I. The Company Was Not Privileged To Withdraw Recognition From The Union Because It Did Not Repudiate Its Prior Unfair Labor Practices In A Timely And Effective Manner

The first ground upon which we would ask the Board to reaffirm its unfair labor practice finding rests on the following proposition, which is our initial answer to the question that the Board posed for oral argument: An employer that unlawfully refuses to recognize and bargain with an incumbent union but that later recognizes and

bargains with the union may not lawfully withdraw recognition unless, at a bare minimum, the employer has first repudiated its prior unfair labor practice in a manner sufficiently timely and effective to repair the injury to employee rights caused by its disruption of the bargaining process. The proposed standard combines the teaching of two important Board decisions, Karp Metal Products Co., 51 NLRB 621, 624-627 (1943), enf'd mem. Oct. 23, 1943, cert. denied, 322 U.S. 728 (1944)("Karp"), and Passavant Memorial Area Hospital, 237 NLRB 138 (1978)("Passavant").

In Karp, the Board fully explained its reasons for thinking that a refusal to recognize and bargain is a serious interference with the right of employees to have representatives of their own choosing:

> Employees join unions in order to secure collective bargaining. Whether or not the employer bargains with a union is normally decisive of its ability to secure and retain its members. Consequently, the result of an unremedied refusal to bargain with a union, *standing alone*, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether.

51 NLRB at 624 (italics added)(footnote omitted). The Board's assessment of the serious harm to employee rights from unlawful refusals to bargain was endorsed by the Supreme Court in Franks Bros. Co. v. NLRB, 321 U.S. 702, 704

(1944)("Franks Bros.") and properly still guides the Board's decisions.[4]

Karp likewise expresses the Board's experienced judgment concerning what must be done to remedy a wrongful refusal to bargain, namely, there must be sufficient good faith bargaining to assure employees that their choice of a bargaining representative will be respected by their employer, thereby restoring the conditions of employee free choice that were unlawfully impaired. 51 NLRB at 626-627 & n. 11.[5]

Also relevant here is the Passavant standard, which the Board uses to evaluate the effectiveness of an employer's

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[4] E.g., Midway Golden Dawn, 293 NLRB 152, n. 21 (1989) employer's open avoidance of incumbent union's attempt to begin contract renewal negotiations over a two-month period "strikes at the heart of the Union's legitimate role as representative of the employees" and "would likely have contributed to the Union's loss of standing among unit employees, thereby rendering unreliable the [employees' decertification petition]"); Louisiana-Pacific Corp., 283 NLRB 1079, 1080 (1987), enf'd, 858 F.2d 576, 578-579 (9th Cir. 1988)(successor's two-month refusal to negotiate following its hiring of a representative complement undermined any objective basis it otherwise had for doubting the union's majority status)

[5] Accord, Franks Bros. Co. v. NLRB, 321 U.S. 702, 704 (1944); Great So. Trucking v. NLRB, 139 F.2d 984, 985-986 (4th Cir. 1944); Sakrete of Northern California v. NLRB, 332 F.2d 902, 908-910 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965); NLRB v. Groendyke Transport, Inc., 417 F.2d 33, 35 (10th Cir. 1969), cert. denied 397 U.S. 935 (1970); Williams Enterprises, Inc., 312 NLRB 937, 939-942 (1993). See also Bishop v. NLRB, 502 F.2d 1024, 1029-1032 & n. 10 (5th Cir. 1974)(approving the Board's "blocking charge" rule precluding decertification elections in circumstances where an employer's unremedied refusals to

voluntary repudiation of an alleged interference with employees' organizational rights. 237 NLRB at 138-139. Although fashioned to evaluate attempts to repudiate threats and other coercive conduct prior to an election, the Passavant standard serves as a benchmark for measuring the adequacy of voluntary efforts to cure an unlawful refusal to bargain. As recently summarized in Gaines Electric Co., 309 NLRB 1077 (1992), for a repudiation to be effective under Passavant,

> it must be timely, unambiguous, specific in nature to the coercive conduct, and adequately published to the employees involved. In addition, it must set forth assurances to employees that no interference with their Section 7 rights will occur in the future, and in fact there must be no unlawful conduct by the employer after publication of the repudiation.

Id. at 1081.[6]

Applying the proposed standard to the facts previously found, the Board should find that the Company was not privileged to withdraw recognition from the Union in July 1990 because it did not repudiate its prior unfair labor practices in a timely and effective manner.[7] Accordingly,

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bargain tended to erode majority support for collective bargaining).

[6] Accord, Stanton Industries, Inc., 313 NLRB 838, 848-850 (1994); The Broyhill Co., 260 NLRB 1366 (1982).

[7] In so arguing, we do not contend that because the Company committed subsequent violations of Section 8(a)(5) by failing to comply with certain union information requests, it is thereby precluded, by analogy to Passavant, from claiming to have effectively repudiated

as the Board previously found (D&O 3 n. 15), the Company's refusal to bargain was not "cured" at the time of the employees' second decertification petition. D&O 3 n. 14.

To begin with, as summarized above and as set forth in the prior decisions of the judge and the Board, the April 11-May 23 hiatus in bargaining that the Company claims to have cured occurred against the following background: an October 1988 Board certification of the Union as the employees' representative; a one-year initial contract scheduled to expire on May 25, 1990; the Union's February 1 request for an agreed-upon date for starting contract renewal talks; and--the Union having received no definite reply from the Company as to dates--a March 26 letter stating that the Union would appear for negotiations on April 11 unless notified otherwise.

Contemporaneously, as the result of unfounded rumors that the Union planned to demand that a union pension plan be substituted for an existing profit-sharing plan, unit employees filed a March 20 petition seeking a decertification election. After receiving notification of

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its six-week refusal to bargain through subsequent good faith bargaining. The judge expressly found that the information request refusals were "technical violations which had no causative influence upon loss of majority." (ALJD 32 n. 45.) The judge continued (id.):

> The unavailability of such information was a behind-the-scenes affair which, if known by employees, was a minor matter of negligible concern. Reasonably viewed, these unfair labor practices neither contributed to a delay in reaching an ultimate accord, nor otherwise contributed to employee discontent.

that petition, the Union met with the employees and heard their concerns. As evidenced by the issues that the Union put on the table in an April 30 letter to the Company (written in response to the Company's admitted rejection of the Union's April 11 bargaining demand and its admitted refusal to bargain until the decertification proceeding was resolved (ALJD 21; Tr. 313-314)),[8] the Union attempted to address those concerns by bargaining for improved medical insurance, upgraded job classifications, a new training program, and increased wages. Before those unlawfully delayed negotiations were completed--but when, by the Company's admission, they were on the verge of success (ALJD 31; Tr. 337-338)--a second decertification petition was signed by employees and the Company broke off negotiations for the second time in less than three months.

In the foregoing circumstances, the Company's delay in rescinding its April 11 refusal to bargain is fatal to its claim to have cured that unfair labor practice through later bargaining, since, as the judge previously found, "its earlier conduct resulted in an irreparable loss of time" (ALJD 20). The record evidence supports the judge's conclusion that the six-week hiatus was "a serious breach" (ALJD 21) that "not only contributed to renewed frustration

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[8] Notwithstanding that admission, the Company continues to maintain that it merely "requested" postponement of negotiations and that the Union "acquiesced" in that

with collective bargaining, but prevented the Union from neutralizing doubts and restoring confidence among represented employees by offering the tangible assurances evident from a new contract" (ALJD 31).

When viewed from the perspective of Karp and Franks Brothers, the Company's claim that a six-week delay at a critical juncture in a bargaining relationship is cured by later bargaining is no more than an attempt to reap the benefit of the demoralizing consequences of delay on the supporters of collective bargaining. When viewed from the perspective of Passavant, moreover, it is striking that although on May 9 the Company effectively acknowledged to the Union that the law obliged it to recede from its April 11 refusal to bargain for a new contract (ALJD 20; G.C. Exh. 9), the record is barren of evidence that the Company took any comparable step to publish its repudiation of its unlawful conduct to employees or to give them the requisite assurances that their Section 7 right to collective bargaining would be respected as fully as their right to refrain.[9]

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request. Employer's Position Statement on Reconsideration at 36-38.

[9] The Company argues that "there is no evidence in the record indicating that any bargaining unit employee was aware of Lee Lumber's [April 11] request [sic] to defer meeting with the Union, or that the start of negotiations had been delayed in any way." Employer's Position Statement on Reconsideration at 29 (emphasis in original). The notion that a 14-person unit that was actively concerned about the contract renewal negotiations (Tr. 235-236, 303, 373), in contact with

In addition, although the Company would have the Board disregard its prior finding (D&O 3, ALJD 15-18) that the Company interfered with employee free choice by unlawfully assisting in the filing of the March 20 decertification petition, that finding is relevant to the Board's assessment of whether the Company's post May-23 bargaining was a sufficient repudiation of its earlier unfair labor practices. Contrary to the Company's argument,[10] its failure ever to repudiate its unlawful assistance prior to the second decertification petition in July further undermines its claim that, because of its subsequent

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top management several times a week (Tr. 359-360, 364), in frequent contact with Board agents investigating the unfair labor practice charges (Tr. 340-341, 231-233, 118), and meeting with union officials on the mill shop floor (Tr. 254-255, 370-373) was unaware that the Company had, by its own admission, flatly refused to bargain with the Union so long as the March 20 decertification proceeding was unresolved (ALJD 21; Tr. 313-314), is difficult to credit. The Company's improbable claim is, in any event, irrelevant. As has been recognized since Karp and Franks Bros., the ability of employees who favor collective bargaining to maintain majority status is dependent on their designated representative's success in negotiation. For that reason, employer stalling tactics that materially impair a union's ability to show results injure those employees' organizational rights regardless of their immediate knowledge of that injury. Regardless of knowledge, it is still true, as the judge found here, that the hiatus in bargaining "prevented the Union from neutralizing doubts and restoring confidence among represented employees by offering the tangible assurances evident from a new contract." (ALJD 31.)

[10] Employer's Position Statement on Reconsideration at 31-36.

bargaining, the second petition is a reliable measure of the employees' representational desires.[11]

The Company argues, among other things, that its compensation of three petition-signers for the several hours they spent delivering or otherwise processing the decertification petition and its reimbursement of their parking fee cannot be deemed unlawful assistance because the three employees did not know they would be compensated until after the petition had been filed and processed. The Company's argument takes no adequate account of the Board's prior finding that the payments in question were not in accord with existing practice, under which the cost of any lengthy absences during the work day was normally borne by the employees themselves, and that the payments therefore constituted a special benefit that conveyed the Company's approbation and support of the decertification effort. Such payments can create a sense of obligation on the part of employees to carry through with the decertification effort they started. Cf. NLRB v. Savair Mfg. Co., 414 U.S. 270, 278 (1973); Teamsters Local 420 (Gregg Industries), 274 NLRB 603, 604 (1985).

If the gift of $16 jackets or the payment of excessive compensation to election observers can be deemed grounds for setting aside a secret ballot election, as is the case under

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[11] In so arguing, we do not question the validity of the Board's earlier finding that the employees' preparation of the March 20 decertification petition was not tainted by any unfair labor practice (D&O 3).

current law,[12] payments like those made by the employer here (and which it has never repudiated) are surely grounds for questioning the reliability of an open petition. That is especially true where that financial assistance was followed by a six-week unlawful refusal to commence bargaining for a new contract.

For the foregoing reasons, we submit that the Company's post-May 23 conduct was insufficient to cure its prior refusal to bargain or its unlawful financial assistance to the employees involved in the decertification effort. Having done nothing timely and effective to restore the conditions for employee free choice that its earlier unfair labor practices had diminished, the Company could not rely on the July petition to terminate its bargaining relationship.

II. The Company Was Not Privileged To Withdraw Recognition From The Union Because That Withdrawal Occurred Prior To The Employees' Expressing Their Desires In A Secret Ballot Election

The argument in the preceding section was based on the Board's prior findings and inferences in this case and its existing precedents. If the Board is disposed to reaffirm its previously stated views, it need not proceed further in this section. We acknowledge, however, that this is a case

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[12] Easco Tools, Inc., 248 NLRB 700 (1980)(payments to election observers); Owen-Illinois, Inc., 271 NLRB 1235 (1984)($16 jackets).

where it is open to the Board reasonably to take a different approach from that expressed in former cases. See, generally, Consolo v. FMC, 383 U.S. 607, 620 (1966)(noting that "the possibility of drawing two inconsistent conclusions from the evidence" does not impugn the reasonableness of the inference drawn by the administrative agency); NLRB v. Lovejoy Industries, Inc., 904 F.2d 397, 401-402 (7th Cir. 1990)(noting that the statute gives the Board considerable latitude in determining what kind of misconduct precludes the holding of a fair election).

Specifically, it has been argued that while a long-term refusal to bargain with an incumbent union may demoralize employees and impair free choice, a short-term refusal is not such a serious interference as to block the holding of a secret ballot election. See Joan Flynn, A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union, 1991 Wisc. L. Rev. 653 at 681, 700-702 (1991). That viewpoint, although doubtful on the facts presented here for the reasons argued above, does have analogies in Board precedent that, in appropriate circumstances, has found partial withdrawals of recognition insufficient to preclude a fair election[13] or unilateral actions not amounting to a complete withdrawal of recognition as not serious enough to require a traditional affirmative bargaining order.[14] Furthermore,

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[13] Empresas Inabon, Inc., 309 NLRB 291 (1992).

[14] Angelica Corp., 276 NLRB 617 at n. 2 (1985), discussed in St.Agnes Medical Center v. NLRB, 871 F.2d 137, 148-149

that viewpoint is germane to one of the issues that the Board addressed with its Labor and Management Advisory Panels on October 25 and October 27, 1994, namely, whether the Board's current policy of blocking most representation petitions when unfair labor practice charges have been filed should be continued.

The facts of this case, moreover, do provide some support for the Company's claim that its post-May 23 bargaining with the Union was adequate to assure its employees that their right to bargain collectively through representatives of their own choosing would be respected. The evidence is undisputed that the parties met in five different bargaining sessions (May 23, May 30, June 7, June 19, and June 25). There is no allegation that the Company did not bargain in good faith. To the contrary, negotiations were productive and the judge accepted the Company's assessment that the parties had almost reached a complete agreement shortly before the second decertification petition (ALJD 21, 31; Tr. 337-338).[15] There also is

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(D.C. Cir. 1989), and in McCarty Processors, 292 NLRB 359, 373 (1989), enf'd mem. 896 F.2d 551 (5th Cir. 1990). But see Guerdon Industries, 218 NLRB 658, 660-662, 673-674 (1975); Mental Health Services Northwest, 300 NLRB 926, 929 (1990).

[15] Cf. Tajon, Inc., 269 NLRB 327, 328 (1984)(where, in the context of concluding that 2-3 months of bargaining with a voluntarily recognized union satisfied the "reasonable time" requirement, the Board emphasized that the bargaining had produced "substantial agreement on many issues, with some important differences remaining, and no impasse" when the union lost its majority status).

evidence that the Company permitted the Union to meet with the employees on the shop floor on paid working time (Tr. 254-255, 370-373). In addition, the employees were invited to attend the May 30 bargaining session and five did so (Tr. 328-330). The Board previously found that the initial March 20 decertification petition, which was apparently signed by 12 of the 14 unit employees (ALJD 14; G.C. Exh. 16, 17), was not the result of any unlawful encouragement by the Company (D&O 3). Against that background, the fact that an undisputed majority of the employees renewed their decertification efforts at a time when a contract was almost in hand could rationally be viewed as evidence of dissatisfaction with union representation itself rather than as a lingering effect of the Company's unlawful refusal to bargain for a six-week period.

Because the foregoing facts would permit the Board to distinguish this case from other cases in which a short refusal to bargain was found sufficient to taint a later decertification petition[16]--and on that basis find that, under existing law, the Company was privileged to withdraw recognition on the basis of the July 20 petition--we wish to direct the Board's attention to features of this case and to anomalies in existing law that suggest existing law should be changed. We submit that the time has come for the Board to consider altering its longstanding rules that allow--

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[16] See cases cited p.8 n. 4, supra.

indeed encourage or sometimes even require--employers to break off or alter bargaining relationships with incumbent unions on receipt of employee petitions like the July petition at issue here.[17]

The Board's current policy is in some tension with the Supreme Court's longstanding dictum that an employer's self-help reliance on employee rights to break off bargaining relationships is not conducive to industrial peace.[18] The Board's current policy, moreover, does little to encourage employers to act in accordance with what the Supreme Court has long thought to be the Board's own view, namely, "that even after the certification year has passed, the better practice is for an employer with doubts to keep bargaining and petition the Board for a new election or other

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[17] Celanese Corp. of America, 95 NLRB 664 (1951)(withdrawal of recognition may be justified by good faith doubt of actual majority, as well as by evidence of actual loss of majority); Anderson Pharmacy, 187 NLRB 301, 303 (1970)(unlawful for employer to enter new contract with incumbent during insulated period when employer knew there was a "serious question" about incumbent's majority status); S.M.S. Automotive Products, 282 NLRB 36, 41-43 (1986)(employee petition demonstrates that incumbent has lost its majority; 8(a)(2) bars employer from closing its eyes to that petition and executing a contract with incumbent); Atwood & Morrill Co., 289 NLRB 794 (1988)(employer's withdrawal of recognition based on a petition signed by a majority of unit employees during pendency of a decertification case was lawful). Accord NLRB v. New Associates, 35 F.3d 828, 832-835 (3d Cir. 1994); NLRB v. Auciello Iron Works, Inc., 980 F.2d 804 (1st Cir. 1992); Chicago Tribune Co. v. NLRB, 965 F.2d 244, 250 (7th Cir. 1992).

[18] Brooks v. NLRB, 348 U.S. 96, 103 (1954); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 50 n.16 (1987).

relief."[19] Under the existing rules, employers have broken off bargaining relationships on the basis of loss-of-majority evidence that, after years of litigation, turns out to involve no more than a mistaken view of the size of the bargaining unit.[20]

Since a divided Board decided Celanese Corp. of America, 95 NLRB 664 (1951)("Celanese"), there has been a growing awareness that a secret ballot election, concededly the best means of ascertaining employee free choice,[21] is vastly to be preferred as a means of deciding whether an incumbent union is still the choice of a majority.[22] Indeed, some courts have voiced the suspicion that the Board, while nominally adhering to Celanese's "good faith doubt" standard, has acted on the view that only proof of actual loss of majority will suffice to satisfy the good faith doubt standard.[23]

There is good reason for the Board not only to actually overrule Celanese's "good faith doubt" standard, but also to

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[19] Brooks v. NLRB, supra, 348 U.S.at 104 n. 18.

[20] Hollaender Mfg Co., 299 NLRB 466 (1990), enf'd 942 F.2d 321, 327-328 (6th Cir. 1991), cert. denied 112 S.Ct. (1992); Virginia Concrete Company, Inc., 316 NLRB No. 55 (February 8, 1995).

[21] NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969).

[22] NLRB v. Cornerstone Builders, Inc., 963 F.2d 1075, 1077-1078 (8th Cir. 1992); Underground Service Alert, 315 NLRB No. 139, 148 LRRM 1145, 1147-48 (1994).

[23] Johns-Manville Sales Corp. v. NLRB., 906 F.2d 1428, 1433 (10th Cir. 1990); Mingtree Restaurant, Inc. v. NLRB, 736 F.2d 1295, 1297 (9th Cir. 1984).

go further and adopt the following rule, which represents our alternative answer to the question the Board posed for oral argument: No employer may lawfully withdraw recognition from a certified bargaining representative unless, at a time when the employer is still honoring its bargaining obligation, a majority of the employees reject union representation in a secret ballot election conducted at an appropriate time and on the basis of a 30% showing of interest.[24]

The present case well illustrates why the proposed rule strikes a better balance of the conflicting interests than the Board's current rules. The employees selected the Union as their bargaining representative in October 1988 in a Board-certified election. The record shows that in March 1990, near the expiration of the Union's first contract, employees conducted a "paper bag" poll in which yes or no votes were cast with some effort a protecting secrecy and that the Union prevailed in that poll (Tr. 244-245, 226, 228, 100-101). Later, that same month, an apparent majority signed a petition that the judge found signified a desire

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[24] Different issues might be presented if, unlike here, a union had never been certified. See NLRB v. Koenig Iron Works, Inc., 856 F.2d 1, 2-4 (2d Cir. 1988). For example, the issue whether an employer must await the certification of election results before withdrawing recognition from an incumbent union might be resolved differently depending on whether the union had been certified initially. Cf. Underground Service Alert, 315 NLRB No. 139, 148 LRRM 1145, 1148 n. 8 (1994); W.A. Krueger, 299 NLRB 914 (1990); Mike O'Connor Chevrolet-Buick-GMC, 209 NLRB 701 (1974), enf'ment denied, on other grounds, 512 F.2d 684 (8th Cir. 1975).

for a Board decertification election (ALJD 21; G.C. Exh. 16, Tr. 250). Then, in July, an employee majority signed the decertification petition that the Company relies on to justify terminating its bargaining relationship (G.C. Exh. 17).

Which expression of the employees' views represents their true representational desires? Why is decisive weight given to the July open petition that did not even afford employees the minimal procedural protections of a poll conducted in accordance with Struksnes Constr. Co., 165 NLRB 1062 (1967)--much less the additional protection afforded by the rule[25] that even a secret ballot poll conducted by an employer is not fair or reliable if the incumbent union has not been provided with advance notice of the poll? And why is so much private and public effort devoted to "'speculation and argument'"[26] about whether, in the face of unremedied unfair labor practices, an open petition is an accurate enough expression of employee free choice to justify the immediate rupture of a bargaining relationship that existed because of an expression of employee free choice in a Board-certified election only two years earlier?

Existing law, we submit, does not afford good enough answers to the foregoing questions. No matter how the Board

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[25] Texas Petrochemicals Corp., 296 NLRB 1057 (1989), modified on other grounds 923 F.2d 398, 403 (5th Cir. 1991); Lou's Produce, Inc., 308 NLRB 1194, 1195 n. 6 (1992), enf'd mem. 21 F.3d 1114 (9th Cir. 1994).

[26] Karp, 51 NLRB at 627 n. 11.

resolves the issue of whether or not the employees' July decertification petition was tainted, that kind of fact-intensive, highly nuanced examination of the circumstances in which an employee petition is sufficient evidence of loss of majority warranting employer self-help is, on balance, an example of misdirected energy. As the District of Columbia Circuit observed generally about the good faith doubt standard in Peoples Gas Sys. v. NLRB, 629 F.2d 35, 43, 44 (1980):

> The problem with this case-by-case approach is that both the employer and the Union are subject to the shifting views of the members of the Board and the courts as to what evidence is sufficiently "objective" and convincing to demonstrate good faith doubt . . . . Obviously, an automatic right to insist on an election . . . would not be appropriate in withdrawal of recognition cases. Nevertheless, a clearcut, objective standard governing the conditions under which an employer will be permitted to challenge a Union's status would seem preferable to the present procedures and standards which leave both the Company and the Union in the dark as to when a challenge can be made, often require years to resolve, and run a substantial risk of frustrating actual employee wishes simply because the Board is not satisfied with the Company's ability to identify and articulate the reasons for its doubt about the Union's support.

Accordingly, we submit, it is appropriate for the Board to rethink the desirability of maintaining rules that invite litigation directed at determining whether an inferior means of ascertaining employee free choice should be allowed to justify the rupture of a bargaining relationship. The present case suggests that the present rules may not well

serve either the interest in fostering employee free choice or the interest in stabilizing existing bargaining relationships. If the Company had continued bargaining, pending the outcome of the election, after it received the employees' July petition, as we argue it should have, the Company thereby would have removed the principal reason for claiming that the prompt holding of a Board-conducted election would be an unfair test of the Union's majority status.[27]

The remaining violation that the Board found (and which it remedied with a cease and desist order and a notice posting provision) was the Company's financial assistance to the three employees involved in filing and processing the March decertification petition. Putting to one side the question whether that conduct which, as shown above, p. , would justify setting aside an election, should also serve to block one, Passavant and its progeny provide all the practical tools needed to remove such an obstacle to the conduct of an election: whether or not the Company agrees that the payments were an interference with free choice, it could nevertheless agree to give the employees notice of the charge and of the employees' undisputed right to exercise free choice for or against union representation without

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[27] See Bishop v. NLRB, 502 F.2d 1024, 1029-1032 & n. 10 (5th Cir. 1974)(approving the blocking of a Board decertification election where an employer's unremedied refusals to bargain tended to erode majority support for collective bargaining).

interference, restraint or coercion. Cf. Stanton Industries, Inc., 313 NLRB 838, 848-850 (1994). An employer willing to give such notice could persuasively blunt objection to the prompt conduct of an election. An employer unwilling to give such notice is in a poor position to object if an election is deferred on that account.

Without gainsaying that the approach suggested here may not have disadvantages of its own and recognizing that we cannot precisely foresee all the consequences of changing the Board's traditional approach, we nevertheless suggest that a flat rule requiring that the employer's evidence of loss of majority be tested in a secret ballot election before withdrawal of recognition is permitted would be more consistent with developing standards, more easily administered, and, importantly, more readily enforced under both Sections 10(e) and 10(j) of the Act.

Three features of our proposed rule warrant brief explanation. First, the limitation that the employer who would withdraw recognition from an incumbent union must await the results of a secret ballot election held at an "appropriate time" incorporates the settled body of Board law associated with that phrase. We anticipate that the issue of when a Board election should be blocked by unfair labor practice charges will continue to be the most controversial issue in that body of law and recognize that other cases may raise more difficult blocking charge issues than the relatively straightforward ones presented on the

facts here. We see no escape from that difficulty other than continuing (and refining) the Agency's commitment to exercise sound discretion in its blocking charge decisions[28] and striving to resolve such issues as rapidly as possible. The decisive issue is whether, pending the outcome of that investigation, the representational status quo must be maintained (as we propose) or whether it may be unilaterally disrupted through employer self-help (as is the current law).

Second, the limitation that the employer who would withdraw recognition from an incumbent union must await the results of "a secret ballot election" is not intended to restrict the parties to a Board-conducted election, but also contemplates the conduct of private elections in accordance with procedures mutually agreed to by the employer and the incumbent union. Our proposal does not contemplate, however, that a unilateral employer poll conducted in accordance with the Board's Texas Petrochemicals standard would remain a valid basis for breaking off an existing bargaining relationship. That employer-controlled procedure does not ensure that the incumbent union will have an adequate opportunity to rally its supporters.

Finally, in suggesting a rule that allows elections if at least 30% of the employees have expressed opposition to being represented by the incumbent union, we are proposing

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[28] See Big Three Industries, Inc., 201 NLRB 197, 197-198 (1973), aff'd 497 F.2d 43 (5th Cir. 1974).

that the 30% standard now applied to employee petitions be applied to employer petitions as well--a position mid-way between the Board's original view when Section 9(c)(1)(B) of the Act was enacted and the current 50% standard set forth in United States Gypsum Co., 157 NLRB 652, 654-656 (1966). We assume that employers will use Texas Petrochemical polls to meet the proposed new standard for Board elections, and in the context of a new rule requiring employers to continue bargaining with the incumbent during the pendency of any election, we would propose that the Board change existing law to permit such polls to be conducted when the employer has objective reason for believing that a substantial number of employees, at least 30%, no longer desire union representation. Absent unusual circumstances, a vote of at least 30% against continued union representation in the poll would be conclusive of any claim that the employer lacked reasonable grounds for conducting the poll.

Under the procedures proposed here, secret ballot elections would be more readily available to employers than they are under present rules. The criticisms that the Board's current standard for employer-initiated elections is unduly rigorous and unfair would thereby be eliminated.[29]

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[29] See NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 797 (1990)(Rehnquist, C.J., concurring); id. at 799-800 n. 3 (Blackmun, J., dissenting); NLRB v. Albany Steel, Inc., 17 F.3d 564 (2d Cir. 1994); Mingtree Restaurant, Inc. v. NLRB, 736 F.2d 1295, 1297 (9th Cir. 1984); Thomas Indus., Inc. v. NLRB, 687 F.2d 863, 867 (6th Cir. 1982); Joan Flynn, A Triple Standard at the

The new restriction on employer self-help would, by the same token, be more acceptable. On balance, we submit, such new procedures would better serve the public interest than the Board's current approach.

If the changes proposed here are accepted by the Board, it must then face the question whether retroactive application of the new policy is appropriate. Generally, administrative agencies are entitled to apply newly adopted policies retroactively if the adverse effects of that action are outweighed by "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." SEC v. Chenery Corp. 332 U.S. 194, 203 (1947).

Given the long history of the Board's Celanese rule and the indications in some Board and court decisions that the policy of the Act is served by employer self-help in refusing to bargain when the good faith doubt standard is satisfied,[30] the Board obviously has the option to decide that any new rule should be applied prospectively only.[31]

NLRB: Employer Challenges to an Incumbent Union, 1991 Wisc. L. Rev. 653, 690 (1991).

[30] See cases cited supra, p.18-19 n.17.

[31] See Alexander Linn Hospital Assn, 288 NLRB 103, 107 (1988), enf'd sub nom. NLRB v. Wallkill Valley General Hosp., 866 F.2d 632 (3d Cir. 1989)(discussing the reasons favoring prospective application of the new rule announced in Dresser Industries, 264 NLRB 1088 (1982), which also had the effect of limiting withdrawals of recognition from incumbent unions). See generally NLRB v. Bell Aerospace, 416 U.S. 267, 294 (1974)(affirming the Board's power to announce prospective rules in adjudicated cases).

We submit, however, that here, as in Deklewa,[32] there are other factors, perhaps less obvious, that justify retroactive application.

First, the extent to which employers could safely rely on the Board's Celanese doctrine was at best uncertain. The rules themselves were clear, but, as indicated above, the case-by-case application of those rules left "both the Company and the Union in the dark as to when a challenge can be made, often require[d] years to resolve, and r[a]n a substantial risk of frustrating actual employee wishes . . . ." Peoples Gas Sys. v. NLRB, 629 F.2d 35, 44 (D.C. Cir. 1980). For that reason, applying the new rule to pending cases in which it is alleged that the employer has violated the former rules would not expose many employers to a risk of liability that they have not already anticipated. Here, for example, the Company was found to have violated the Act under the old rule and its liability would not be altered if the Board reaffirmed that liability in whole or in part on the basis of the new rule.

Moreover, the growing doubts about the desirability of employer self-help discussed above, pp. 19-20, as well as criticism of the Board's current standard by courts and private parties,[33] foreshadowed the possibility that the

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[32] John Deklewa & Sons, 282 NLRB 1375, 1389 (1987), enf'd sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir.), cert. denied 488 U.S. 889 (1988).

[33] Peoples Gas Sys. v. NLRB, supra, 629 F.2d at 43 & n. 15 (questioning the consistency of the Board's adhering to a

Board's rules might be modified or reversed, thereby further weakening any claim of unfair surprise.[34] Indeed, as argued above, the same policy justifications that foreshadowed the changes we propose also support the conclusion that the burdens of the new rule are outweighed by the benefit of better accommodating the policies of stability and employee free choice. Finally, applying the proposed new rules to all pending cases in whatever stage, in accordance with the Board's usual practice, would avoid the necessity of perpetuating, for an indefinite time, "the administrative and litigational difficulties" entailed by the current law. Deklewa, 282 NLRB at 1389. For the foregoing reasons, if the Board adopts the rules proposed here, it should apply them retroactively.

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good faith doubt standard for withdrawals of recognition while rejecting that standard in the context of initial recognition); NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 788 n. 8 (1990)(noting the AFL-CIO's contention that Celanese should be overruled and that the Supreme Court has never passed on its validity); Joan Flynn, A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union, 1991 Wisc. L. Rev. 653, 704 (1991)("The NLRB's current scheme for regulating employer challenges t an incumbent union is an absolute shambles.").

[34] United Steelworkers v. NLRB, 983 F.2d 240, 245 (D.C. Cir. 1993); NLRB v. Lyon & Ryan Ford, Inc., 647 F.2d 745, 757 (7th Cir.), cert. denied 454 U.S. 894 (1981). See also Superior Bakery, Inc. v. NLRB, 893 F.2d 493, 498 (2d Cir. 1990)("In refusing to bargain with the Union, [the employer] ran the risk that the Board might later find, with the benefit of increased experience, a violation of the labor laws.").

III. An Affirmative Bargaining Order Is The Appropriate Remedy For The Company's Protracted Unlawful Refusal To Recognize The Union

If the Board reaffirms its prior finding that the Company unlawfully withdrew recognition from the Union in response to the employees' July petition, it must then decide whether that violation warrants an affirmative bargaining order. For the reasons stated in our position statement in Caterair International, 31-CA-18702, submitted this day and served on all the parties to this case, we contend that the traditional affirmative bargaining order, with its attendant bar of decertification petitions for a reasonable period, is the appropriate remedy.

Briefly, regardless of whether a union was entitled to a decertification bar at the time of the unfair labor practice, the Board justifiably includes such a bar as part of its ordinary remedy for an unlawful refusal to recognize that union. That remedial policy reflects the Board's experienced judgment that an employer's unlawful refusal to recognize a majority representative predictably causes majority support to unravel. To meaningfully remedy that injury to the organizational rights of employees, it is not enough simply to reseat the wrongfully ousted representative

and order the employer to cease its wrongful conduct. Unless the sometimes lengthy process of proving that majority rights were injured is to be the means of compounding that injury, it is also necessary to afford the ousted representative a reasonable period of stability within which to reorganize its supporters and to negotiate a collective bargaining agreement.

In so vindicating the Section 7 rights of employees to have representatives of their own choosing, the Board does not restrict the rights of the employees opposed to unionization more than appears necessary to restore conditions in which effective bargaining might again be possible and to afford the parties a fair chance to conclude a contract. After there has been sufficient good faith bargaining to demonstrate to employees that their right to bargain collectively over the terms of their employment will be respected, then, the conditions of employee free choice having been restored, employees are free to change their representational arrangements.

In sum, as the Board recently reaffirmed, the traditional decertification bar remedy is a reasonable limitation on employee free choice that protects the rights of the wronged employee majority that chose union representation and prevents the employer from profiting from its own wrongful injury to employee rights. Williams Enterprises, Inc., supra, 312 NLRB at 940-942. There are no special circumstances that warrant a different remedy here.

Assuming that the Company will contend that the delay of this litigation is a special circumstance, that contention was summarily rejected in NLRB v. Katz, 369 U.S. 736, 748 n. 16 (1962). Accord, NLRB v. Wallkill Valley General Hospital, 866 F.2d 632, 637 (3d Cir. 1989).[35]

[35] There is no merit to the statement in Texas Petrochemicals Corp.v. NLRB, 923 F.2d 398, 404 n. 11 (5th Cir. 1991), that NLRB v. Katz, supra, has been deprived of precedential force by Congress' amending the Administrative Procedure Act to require agencies to adjudicate cases within a "reasonable time," 5 U.S.C. §555(b). There is no material difference between the language of the APA as it existed in 1962 and the substitute language of the 1966 amendment. Compare the Act of June 11, 1946, ch. 324, § 6, 60 Stat.240 ("Every agency shall proceed with reasonable dispatch to conclude any matter presented to it") with the Act of Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 385, codified at 5 U.S.C. § 555(a) ("within a reasonable time, each agency shall proceed to conclude a matter presented to it"). That APA provision did not affect the Board's authority under Section 10(c) of the Act to issue remedial bargaining orders.

The First Circuit's reliance on delay to refuse enforcement of an affirmative bargaining order in favor of a certified incumbent union in NLRB v. Laverdiere's Enterprises, 933 F.2d 1045, 1054-1055 (1st Cir. 1991), appears inconsistent with that Court's previous decisions recognizing the injurious impact of an unlawful refusal to bargain on employee free choice during the delays of litigation. See NLRB v. Franks Bros. Co., 137 F.2d 989, 994 (1st Cir. 1943), aff'd 321 U.S. 702, 704-705 (1944) and cases cited supra, p. 8 n. 5. .

CONCLUSION

For the foregoing reasons, the General Counsel urges that the Board reaffirm its prior decision and order in this case.

Respectfully submitted,

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